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Testing the Limits of Protection for Title VII Participation and Opposition Activities

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Title VII of the Civil Rights Act of 1964 protects employees not only from discrimination in the workplace but also from retaliation by their employers for "opposing" unlawful discrimination or for "participating" in Title VII proceedings. The "participation" protection prohibits the employer from retaliating because the employee has made a charge, testified, assisted, *or participated in any manner* in an investigation, proceeding, or hearing pursuant to Title VII. See 42 U.S.C. §2000e-3(a). The Supreme Court has recognized the importance of Title VII's anti-retaliation provisions as maintaining "unfettered access" to one of the Act's remedial purposes of addressing discrimination in the workplace. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). However, the range of "activities" that qualify for protection under the "participation" or "opposition" clauses is a source of prolific Title VII litigation. This article will explore recent caselaw from around the country where plaintiffs test the limits of Title VII's protections for their "opposition" and participation" activity.

Enhanced Protection for "Participation" in Title VII Proceedings

The protection from retaliation for "participation" provides broad protection for a limited range of conduct. To invoke the broad protection for "participation" the employee must demonstrate that she was involved in some way with a proceeding under Title VII—either a formal charge pending before the Equal Employment Opportunity Commission ("EEOC") or a Title VII lawsuit. See *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41 (2nd. Cir. 2012). Participating in an employer's purely internal investigation does not qualify for anti-retaliation protection under the participation clause of Title VII. See *Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741 (7th Cir. 2010). However, once the participation clause is invoked, the federal courts have jealously guarded the employee's right to "participate" in Title VII proceedings. In fact, "participation" can mean much more that simply speaking to an investigator, signing an affidavit or testifying at trial. As the Supreme Court has noted, with respect to the text of the Title VII retaliation language: "read naturally, the word '*any*' (with respect to the scope of protected participation activity) has an expansive meaning," and thus the term "any" must be given *literal* effect." *United States v. Gonzales*, 520 U.S. 1, 5, (1997). (*emphasis* added) The Eleventh Circuit in *Vaioous Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) held that "The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection upon employees covered by Title VII." Similar results were reached by the Second, Fourth and Sixth Circuit Courts of Appeals. See *Deravin v. Kerik*, 335 F.3d 195, 204 (2nd Cir. 2003), *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052, 148 L. Ed. 2d 560, 121 S. Ct. 657 (2000); *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999).

Both the Second and Eleventh Circuit Courts of Appeals have held that even an employee's involuntary participation as a defendant in a Title VII qualifies as protected activity. In *Deravin*, the Second Circuit adopted the rational of the case of *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997) to find that an employee could not be retaliated against for successfully *defending* himself in a prior sexual harassment case. Deravin was a correctional officer that was falsely accused of sexual harassment and successfully defended himself by among other things, testifying in his own defense. The Second Circuit noted that the they found no absurdity in the result that successfully defending oneself in a Title VII complaint could lead to another complaint by the vindicated employee that he had been later retaliated against for the successful defense. Of course, the employee must still prove a causal connection between the successful defense of the claim and his termination---that he was in fact retaliated against for the "participation" in a Title VII proceeding. For both participation and opposition claims, the plaintiff bears the burden of establishing that unlawful retaliation "would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

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Even defense attorneys are entitled to protection from retaliation. A defense attorney's participation in an EEOC mediation is "protected activity" under Title VII's participation clause. In *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008), the plaintiff was a deputy city attorney defending the city in an EEOC mediation. One year later, the plaintiff's attorney in the EEOC mediation was elected as mayor of the City of Albuquerque and promptly terminated the defense attorney's employment. The Tenth Circuit Court of appeals held that that plain language of the anti-retaliation provision of Title VII covers defense attorneys representing litigants in Title VII proceedings and that the "all embracing language" of § 200e-3(a) advances Congress' goals of ensuring fair, effective and transparent administrative processes. *Id*. at 813.

Even passive participation has been considered protected activity. In *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 (2nd Cir. 2005), Jute had been identified as a potential witness to unlawful workplace harassment. Jute had advised that she was willing to testify to what she observed but never *actually* testified in the Title VII case. Jute was later terminated by her employer and filed her own Title VII case claiming that she was terminated in retaliation for her willingness to testify as to the workplace harassment. The Court ruled that since Jute had indicated she was willing to testify as a witness to discrimination and was identified as a witness, she had "participated" in a Title VII proceeding and was entitled to protection from retaliation by her employer.

However, illegal activity, including the unauthorized accessing of personnel files to gather evidence for use in a Title VII proceeding, is not protected as "participation" activity. See *Netter v. Barnes*, 908 F.3d 932 (4th Cir. 2018). While "participation" protection only applies to actions taken in connection with a Title VII proceeding, the reach extends beyond court proceedings. A federal employee that visits with an Equal Employment Opportunity Counselor has engaged in protected activity even tough an official proceeding has not yet been initiated. *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997). Employees that participate in an employer's investigation into unlawful discrimination in connection with a pending EEOC charges are also entitled to protection from retaliation. *Abbott v. Crown Motor Co.*, 348 F.3d 537 (6th Cir. 2003).

Protection for "Oppositional" Activities

It is also unlawful for an employer to retaliate against an employee that has "opposed any practice made an unlawful employment practice" under Title VII. See 42 U.S.C. §200e-3(a). This "opposition" clause provides qualified protection to a wide range of conduct. *See, Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 277-78 (2009) (holding that protected opposition activity need not be "active" or "consistent"). In contrast to the participation clause, the opposition clause contains no limitation to formal Title VII proceedings "under this subchapter." However, the opposition clause also lacks the participation clause's express protection for "any manner" of conduct. The major difference (and hurdle) for a Title VII plaintiff claiming retaliation for oppositional activities is that she must show (1) that she reasonably believed that the employment action she opposed constituted a Title VII violation, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015) (en banc), and (2) that her conduct in opposition was reasonable. See *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998).

The Supreme Court has ruled that the term "oppose" goes beyond "active consistent" behavior in ordinary discussions. See *Crawford v. Metropolitan Gov. of Nashville*, 555 U.S. 271, 277 (2009). The Court noted that "Countless people were known to 'oppose' slavery before Emancipation…without writing public letters, taking to the streets or resisting government." *Id*. The Court in *Crawford* found that an employee could oppose discrimination by responding to someone else's question about a supervisor's conduct just as surely as by directly provoking the discussion. The traditionally conservative Fourth Circuit has found that, "an employee is protected when she opposes 'not only . . . employment actions actually unlawful under Title VII but also employment actions [she] reasonably believes to be unlawful…We conclude from this review of the statute and case law that we must examine the course of a plaintiff's conduct

through a *panoramic lens, viewing the individual scenes in their broader context and judging." DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015).

The Court in *DeMasters* held that an employee's use of *informal grievance procedures*, staging informal protests and voicing her opinions in order to bring attention to an employer's discriminatory activities was oppositional activity subject to protection from employer retaliation. Moreover, in *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009) the court found that protected oppositional activity that included "complain[ing] about unlawful practices to a manager, the union, or other employees."

However, the Courts have exercised restraint in extending the opposition clause to activities without a clear link to Title VII protections. The Seventh Circuit has ruled that generic complaints about "favoritism" and about remarks from a supervisor that the plaintiff was "pissing him off" were not opposition activity because the plaintiff failed to link his complaints to a protected basis (i.e. discrimination based upon race, relations, gender, etc.). See *Huang v. Continental Cas. Co.*, 754 F.3d 447 (7th Cir. 2014). Likewise, a female prison guard plaintiff's complaint that night shift staff were having sex on her desk, while a valid workplace complaint, was not rooted in the fact the she was a woman and not considered "opposition" activity under Title VII. *Orton-Bell v. Indiana*, 759 F.3d 768 (7th Cir. 2014).

Several plaintiffs have gone so far as to argue that they should be allowed to access the confidential the files of their coworkers to uncover evidence of Title VII discrimination. Despite internal workplace policies and even state statutes prohibiting such conduct, the plaintiffs nevertheless claimed that such conduct was protected "oppositional" activity under Title VII. In *Colon v. Tracey*, 717 F.3d 43 (1st Cir. 2013), the plaintiff argued that her sharing of confidential salary information that she obtained while, as part of her job duties, she investigated an in-house claim of sex-based pay discrimination. The First Circuit disagreed and found that Title VII did not invalidate the employer's legitimate requirements that the employee keep the information confidential and that she only store the data on a secured network. The plaintiff's policy violations were a legitimate, non-discriminatory reason for her suspension.

Similarly, Title VII opposition activity does not encompass the use of confidential personnel files protected by state statute. In the case of *Netter v. Barnes*, 908 F.3d 932 (4th Cir. 2018), that plaintiff (Netter) worked for the Guilford County Sheriff's Office for many years, with an unblemished disciplinary record. In 2014, when she received a disciplinary sanction that barred her from testing for a promotion. Netter filed timely complaints with the Equal Employment Opportunity Commission ("EEOC"). She alleged that similarly situated officers, who were neither Black nor Muslim, had not been similarly disciplined. Following up on Netter's complaint, an investigator office asked her if she had evidence to support her discrimination claims. In response, Netter reviewed, copied, and supplied the investigator with the confidential personnel files (which she maintained in a file cabinet in her shared office) of two subordinate employees. Netter also provided the investigator with the personnel files of three other employees which she obtained through a personal request to a co-worker. Netter acknowledged that she knew the files were confidential but nonetheless did not seek permission from the five employees or her own supervisors to copy and disclose them. Netter gave copies of all five files to the EEOC and the lawyer representing her. In response to a pretrial discovery request, Netter's counsel provided copies of the files to defendant employer. This led the employer's attorneys to inquire how Netter obtained the files. In deposition testimony, Netter admitted that she had acted as outlined above. Netter was then fired for violating her employer's internal policies and because Netter had violated state law — namely, N.C. Gen. Stat. § 153A-98 which imposed criminal penalties for reviewing or disseminating information in county personnel files without authorization.

The Fourth Circuit soundly rejected Netters argument that her unauthorized review of confidential files was reasonable opposition activity. The Court ruled that "Under the opposition clause, unauthorized disclosures of confidential information to third parties are generally unreasonable. *Netter* at 938 *See also Jefferies v. Harris Cty. Comm. Action Ass'n*, 615 F.2d 1025, 1036-37 (5th Cir. 1980) holding disclosure of personnel records and agency documents unprotected as opposition in light of employer's "legitimate and substantial interest" in confidentiality. The Court went on to comment that Netter's *review* of the files, which she lacked permission to

access, falls decidedly outside the scope of reasonable opposition and quoted the Ninth Circuit's proclamation that "We are loath to provide employees an incentive to rifle through confidential files looking for evidence." *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 763 (9th Cir. 1996)

Title VII plaintiffs enjoy broad protections from retaliation when they participate in Title VII proceedings and when they oppose discriminatory conduct. However, when an employer can show that the oppositional conduct violates a sound company policy or is objectively reasonable, it can often avoid liability for claims of retaliation.

About the Author

Barry Montgomery is a partner with *KPM LAW* and focuses his practice on labor and employment law and litigation, as well as professional liability litigation. Barry believes that labor is the force that drives our economy and that an organization's greatest resource is its employees. Barry believes that management and professional decisions can be vigorously defended in and out of court without compromising an organization's brand or relationship with its workforce. Barry has first chair trial experience in over 75 jury trials in state and federal court and regularly represents clients before the United States Equal Employment Opportunity Commission, the Virginia Department of Labor & Industry and professional regulatory boards. He has prosecuted and defended multi-million dollar cases to verdict.

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